

## **Lautenschlager announces view on U.S. Supreme Court Decision regarding U.S. Army Corps regulation of wetland filling**

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MADISON — Attorney General Peg Lautenschlager announced her view that today's U.S. Supreme Court decision on the breadth of U.S. Army Corps regulation of wetland filling activity should not affect wetland regulatory protections in Wisconsin.

"Wisconsin law is clear that whatever wetlands are not protected by the federal law are protected under state law," Lautenschlager said.

A divided U.S. Supreme Court split 4-4-1 on the scope of U.S. Army Corps of Engineers authority to protect wetlands adjacent to non-navigable tributaries of navigable waters, with Justice Kennedy striking a third position. Under Justice Anthony Kennedy's opinion, the Corps may regulate a wetland adjacent to non-navigable water after a case-by-case investigation shows the wetland to have a significant connection to the quality of downstream navigable water.

"Regardless of the confusing state of federal law left by the U.S. Supreme Court yesterday, no fewer wetlands will be protected in Wisconsin after today than before," Lautenschlager said.

She explained that the U.S. Supreme Court, in *Solid Waste Agency of Northern Cook County v. Arl Corp. of Engineers*, 531 U.S. 159, 167 (2001) (SWANCC), held that the Clean Water Act did not regulate the filling of "isolated" wetlands that are not adjacent to or hydrologically connected to navigable waters. Thus, wetland habitats for wildlife and having water quality benefits previously thought to be protected by the Act were declared to be no longer protected from destructive filling activities under the federal act.

In response to SWANCC, however, the Wisconsin legislature enacted 2001 Wis. Act 6 in order to provide for state regulation of filling activities in wetlands held to be no longer covered by Clean Water Act Section 404, 33 U.S.C. § 1344.

Under Wis. Stat. §281.36(1m)(a), a Wisconsin wetland that was no longer covered by the federal law was defined in Act 6 as "nonfederal wetland." A "nonfederal wetland" includes a "wetland (that) is determined to be a nonnavigable, intrastate, and isolated wetland under the decision in (SWANCC) or

any subsequent interpretations of that decision by a federal agency or by a federal district or federal appellate court that applies to wetlands located in this state.” Today’s U.S. Supreme Court decision discusses and interprets the *SWANCC* decision.

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